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No. 10-306

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Steven Roberts, Shane Deardorff, Matthew T. Shuey, Michael Lyons, Clair Martin, Timothy M. Wheale and Gordon J. Berlin,
Petitioners

v.

Jack F. Mentzer, Joseph M. Ditzler and Elizabethtown Borough,
Respondents

On Petition for a Writ of Certiorari to the Unted States Court of Appeals for the Third Circuit of Pennsylvania
Case No.: 09-3251

BRIEF IN OPPOSITION

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Questions presented

1. WHETHER THE COURTS BELOW PROPERLY CONCLUDED THAT PETITIONERS DID NOT HAVE A PROTECTED PRIVACY INTEREST AND/OR PROPERTY RIGHTS IN BOROUGH OWNED AND MAINTAINED PERSONNEL RECORDS AND FILES USED DURING THE PRIVATE DISCOVERY DEPOSITIONS IN THE PREDECESSOR LITIGATION?

2. WHETHER THE COURTS BELOW PROPERLY CONCLUDED THAT THE CLAIMS AGAINST RESPONDENTS MENTZER AND DITZLER WERE BARRED BY QUALIFIED IMMUNITY IN THAT THEIR ACTIONS IN UTILIZING BOROUGH OWNED AND MAINTAINED PERSONNEL RECORDS AND FILES IN THE DEFENSE OF THE PREDECESSOR LITIGATION DID NOT VIOLATE CLEARLY ESTABLISHED RIGHTS OF WHICH A REASONABLE OFFICIAL WOULD HAVE KNOWN?

Rule 29.6 Disclosure Statement

This Brief in Opposition is not subject to any provisions of Supreme Court Rule 29.6 as Respondents are a local governmental agency and employees thereof.

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COUNTERSTATEMENT OF THE CASE

Petitioners, Michael S. Lyons, Stephen [misnamed Steven] L. Roberts, Shane Deardorff, Matthew T. Shuey, Clair Martin, Timothy W. Wheale and Gordon J. Berlin initiated a civil action by filing Complaint on September 16, 2008. (JA p. 5, Doc. 1) Named as Defendants in the Complaint were Jack F. Mentzer, Joseph M. Ditzler and Elizabethtown Borough. (*Id.*) Michael S. Lyons was also a Plaintiff in a previously filed civil action involving the identical Defendants and docketed in the United States District Court for the Eastern District of Pennsylvania at docket number 5:08-CV-00094 ("Lyons I"). The remainder of the Petitioners in the case at bar are all current or former police officers employed by

the Borough of Elizabethtown who were deposed during the discovery phase of Lyons I. (JA p. 21; Am. Comp. ¶14) The parties to, theories alleged and facts set forth in Lyons I are intertwined with the subject matter of the instant action.

In Lyons I, the predecessor civil action, Petitioner, Michael S. Lyons, Sr. claimed that his First and Fourteenth Amendment rights were violated and that he had been retaliated against by Respondents Mentzer, Ditzler and the Borough for speaking out on matters of alleged public concern. (JA pp. 33-35; Lyons I Comp. ¶¶1, 7-9) In that civil action Lyons also alleged that he "suffered retaliation in the form of disparate treatment such as improperly applied and excessively severe and unique punishment

different from how other officers similarly situated were treated." (JA p. 35; Lyons I Comp. ¶9) He further claimed that he was ostracized, given less desirable duty assignments, harassed, and had his professional standing called into question with surrounding police departments. (*Id.*) Central to his proofs in Lyons I, Petitioner Lyons had to establish that he was subjected to more stringent and/or severe terms and conditions of employment than other similarly situated employees of the Elizabethtown Police Department.

During Lyons I, Lyons served Initial Disclosures pursuant to Rule 26 (a), Federal Rules of Civil Procedure in which he identified himself, Shane Deardorff, Cpl. Gordon Berlin,

Clair R. Martin, and Matthew Shuey as "witnesses that have knowledge of the claim that is the basis of this lawsuit." (SA pp. 3-4) At that time, Petitioner Lyons indicated that "additional witnesses will be identified as the litigation proceeds and witnesses become available." (SA p.4) Petitioners Roberts and Wheale were also identified as fact witnesses during discovery in Lyons I.

During discovery in Lyons I, Petitioner Lyons propounded a Request for Production of Documents seeking production of his complete personnel file, the complete personnel file of Officer Finicle (a defense fact witness), any and all documents identified in Respondents' Initial Disclosures, and various other documents in an

attempt to substantiate the conclusory averments of disparate treatment set forth in the Complaint. (SA pp. 7-8) At no time during the discovery phase of Lyons I did Attorney Bailey and/or Petitioners complain of any alleged misconduct with respect to the manner in which the depositions were conducted. In fact, the dockets for Lyons I (JA pp. 27-32) confirm that there were no discovery motions filed nor any discovery conferences requested to address Petitioners' claims of misuses and/or abuses of their Borough owned and maintained personnel files and records in the predecessor civil action.

Following the dismissal of Lyons I via a defense Summary Judgment Motion, Petitioners initiated the instant civil action. In an Amended

Complaint, Petitioners acknowledged that they were all identified as potential fact witnesses in the Lyons I Initial Disclosures and were deposed by defense counsel during the discovery phase of the predecessor civil action. (JA p. 21; Am. Comp. ¶¶11-13) Petitioners further averred that Chief Mentzer, on behalf of the Borough, maintained personnel files on each of the officers employed by the Elizabethtown Borough Police Department and that Respondents Mentzer and Ditzler, along with the Borough Manager and defense counsel accessed those files and communicated amongst themselves and with defense counsel regarding deposition preparations in Lyons I. (JA p. 22; Am. Comp. ¶¶15-17) The Complaint also asserted that all of the Petitioners were deposed

in Lyons I and that Petitioners' counsel utilized information from their personnel files while cross examining them at their depositions. (JA pp. 22-23; Am. Comp. ¶¶18-19)

By Memorandum and Order dated July 2, 2009, District Court Judge Sanchez granted Respondents' Motion to Dismiss the Amended Complaint, but denied Respondents' Motion for Rule 11 Sanctions. (Appendix B, 16a-26a) In dismissing Petitioners' First Amendment claims, the District Court ruled that Petitioners failed "to show a separate retaliation or were prevented from freely appearing as witnesses, associating with persons of their choosing or accessing and using the Courts." (*Id.*, 19a-20a) Judge Sanchez further found that since Petitioners had no

reasonable expectation of privacy in their personnel files which were owned and maintained by the Respondents, their Fourth Amendment rights were not implicated. (*Id.*, 20a-23a) The District Court also ruled that the Fourteenth Amendment due process claims failed because there was "no authority to support Plaintiffs' contention they had a property interest in their personnel files" which were used in discovery depositions in the predecessor civil action. (*Id.*, 22a-23a)

In the alternative, Judge Sanchez concluded that the Amended Complaint against Respondents Ditzler and Mentzer was subject to dismissal on qualified immunity grounds in that they "were not on notice that accessing personnel

files in their possession was unlawful" and because "there was no clearly established rule against Defendants' actions." (*Id.*, 23a-24a) The District Court did not reach the absolute immunity/judicial privilege defense asserted by Respondents. Finally, Judge Sanchez ruled that the Amended Complaint failed to state any cognizable §1983 municipal liability claims against Elizabethtown Borough. (JA pp. 15-16)

Petitioners filed a timely Notice of Appeal. On May 27, 2010 a panel of the United States Court of Appeals for the Third Circuit issued a non-precedential opinion and order affirming the dismissal of Petitioners' Amended Complaint. (Appendix A, 1a-15a) The Appellate Court found that the Amended Complaint did not assert any

cognizable claims for violation of the Petitioners' First Amendment claims (right to access, right to petition, right of association and/or retaliation). (*Id.*, 4a-11a) In affirming the dismissal of the Fourth Amendment claims, the panel found that Petitioners did not have a privacy interest and/or reasonable expectation of privacy in the personnel files maintained by their employers. (*Id.*, 11a-12a) The panel further concluded that there were no cognizable substantive due process claims arising out of the use of the personnel files during the depositions conducted in Lyons I. (*Id.*, 12a-13a) In the alternative, the Third Circuit found that the claims against Respondents Mentzer and Ditzler were barred by qualified immunity (*Id.*, 13a-15a) and there was no cognizable municipal

liability claim against the Borough. (*Id.*, 15a) Petitioners did not seek re-hearing by the merits panel and/or the Third Circuit en banc.

On September 1, 2010, Petitioners' Petition for a Writ of Certiorari was docketed by this Honorable Court. Two questions were presented for review in that Petition. The reference to the rights of private employees in question #1 (Petition, p.1) is misplaced in that all of the Petitioners are current or former municipal police officers and there were no claims presented to the courts below in the context of employment in the private sector. Respondents now file this Brief in Opposition to the Petition for a Writ of Certiorari.

REASONS FOR DENYING PETITION

I. There are no protected privacy interests and/or property rights implicated in the use of Borough owned and maintained personnel records and files during the private discovery depositions in the predecessor litigation.

On appeal, Petitioners have seemingly chosen to largely abandon their First Amendment claims to focus their argument on whether or not Petitioners possessed a privacy interest and/or property right in the contents of Borough-owned and Borough generated personnel files. Other than their broad appeal to natural law concepts, Petitioners have failed to demonstrate that any such privacy interest and/or property right exists either as a matter of law or as a creature of statute. To the contrary, the courts below were

correct when they concluded that the use of Borough-owned and Borough generated personnel files during the private discovery depositions in Lyons I did not violate Petitioners Fourth and/or Fourteenth Amendment rights.

In a federal civil rights action, federal law--not state law--controls what evidence is privileged and discoverable. Fed. R. Evid. 501; Horizon of Hope; Ministry v. Clark County, Ohio, 115 F.R.D. 1, 4 (S.D. Ohio 1986). Under federal law there exists no general privilege for personnel files, even those of law enforcement officers. Horizon of Hope, 115 F.R.D. at 6 (police officer personnel files discoverable); Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991) (allowing discovery of records of police officer background check);

Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980) (allowing discovery of EEOC personnel files). In fact, it is common practice for personnel files to become part of the record in matters involving litigation. Jones v. City of Wilmington, 299 F. Supp. 2d 380, 394 (D. Del. 2004) (finding no privilege under federal law for personnel files and ordering production of relevant files); Watts v. Kimmerly, 1996 WL 911254 (W.D. Mich. Apr. 12, 1996) (affirming magistrate's order that granted Petitioners' motion to compel discovery of personnel files of police officers who were not named Respondents in Title VII action).

Since there is no general federal statutory privilege protecting personnel files, then Petitioners must identify a right to privacy

arising from the Fourth Amendment. As the District Court rightly observed, the United States Supreme Court has concluded that the capacity of a government employee to claim the protection of the Fourth Amendment depends on whether the area or item searched was one in which the employee had reasonable expectation of privacy. O'Connor v Ortega, 480 US 709 (1987).

The determination of the following facts by the District Court are critical to addressing the Petitioners' flawed claim that any privacy right exists under O'Connor, *supra*:

> The Petitioners were all current or former police officers employed by Elizabethtown Borough. (Appendix B, 17a)
>
> In his pretrial disclosures in Lyons I No. 08-94 individual Petitioner

> Michael S. Lyons identified all of the Petitioners as individuals possessing discoverable information regarding the claims set forth in Lyons I. (*Id.*)
>
> During depositions in Lyons I, the Borough of Elizabethtown, its Police Chief and Lieutenant (collectively "the Borough Respondents") used Borough-owned and Borough generated personnel files to cross-examine Petitioners. (*Id.*, 18a)
>
> The Borough Respondents owned and maintained the [Petitioners'] personnel files and had free access to those files. (*Id.*, 22a)
>
> The Petitioners themselves admitted in their Amended Complaint that the Borough Respondents "were responsible for maintaining the personnel files for all Elizabethtown police officers in the ordinary course of business." (*Amended Complaint* at ¶¶ 15 and 16)

The Fourth Amendment provides that persons shall have the right to be secure in their

persons, houses, papers and effects against unreasonable searches and seizures by the government. O'Connor, *supra*. The necessary predicate to finding a violation of the Fourth Amendment is the requirement that someone other than the governmental employer own the "papers and effects" which they claim were improperly searched.

There was no evidence below that the Petitioners maintained control over or owned the Borough's personnel records. To the contrary, the Petitioners' Amended Complaint admitted that it was the Borough and its employees who "were responsible for maintaining the personnel files for all Elizabethtown police officers in the ordinary

course of business." (*Amended Complaint* at ¶¶15 and 16)

The District Court correctly concluded that no reasonable expectation of privacy existed since each officer's personnel file had always been in the possession of the Borough Respondents/employer, not the Petitioners who were the employees. (Appendix A, 22a) Under the facts as plead, the District Court could come to no contrary conclusion.

Put another way, it is entirely inconsistent to admit that the Borough Respondents possessed the right to maintain and use Borough owned employment and personnel records on a day to day basis but—following the institution of a lawsuit—be prevented from using that same

information already in its possession to defend itself in an employment lawsuit.

Additionally, there can be no invasion of any individual's Fourth Amendment right to privacy where the alleged private material disclosed was already known to the recipient. Far from "revealing" the contents of any individual Respondent's personnel file, Petitioners were asked questions during their depositions regarding information in their personnel files about which they *should already have been well aware*.

Further, the District Court properly concluded that there was no invasion of any individual's Fourth Amendment right to privacy where the deposition itself was a private event

attended by the same people charged with maintaining the personnel files in the first place. (Appendix B, 22a; *Amended Complaint* at ¶¶15 and 16) Under these circumstances, the use of the files during a private deposition could hardly be deemed a "disclosure" of information not previously known since the people also in the room created the information in the personnel file or they were the custodians of the file.

As to Petitioners'[1] claims that they possessed some due process rights arising under

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[1] There is no regulation, no policy and no rule that would establish any such due process right. In fact, no court has ever embraced a rule imposing due process requirements on an employer's review of personnel files owned and maintained by the employer because any such rule would be a significant restriction on the ability of employers to manage its workforce. If an employee had

the Fourteenth Amendment, the District Court correct concluded that:

> There is no authority to support Petitioners' contention that they had a property interest in their personnel files. Further nothing supports Petitioners' position [*sic*] a property interest, if any, was deprived when Respondents used, for purposes of discovery, files which Petitioners themselves had placed at issue.

Obviously, since the files were not the Petitioners' property, then no process could be due because there could be no denial of a property interest. There is simply no basis to contend, as Petitioners do, that any right under the Fourth or Fourteenth

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> the right to demand due process before an employer accessed, reviewed or used the employment files and records that the employer owned and maintained, effective personnel management would be impossible.

Amendments was violated by the Borough Respondents' acts.

On appeal to the Third Circuit, Petitioners argued (Appellants' Brief at p. 13) that they have a "confidential, protected privacy right" in their personnel records and files and that this right is "so well known that judicial notice could be taken of this state of affairs." Petitioners' argument on this point was apparently so fundamental that Petitioners deem it unnecessary to encumber it with any citation to legal precedent at all. *Id.*

Further, Petitioners have attempted to mislead this Court and obscure this issue. Petitioners incorrectly aver that these records were used by individuals who were being sued in their individual capacities. (Petition, p. 5)

Petitioners appeal to claim that Chief Mentzer and Lt. Ditzler took the Borough's personnel files for their own use without notice or warning to the Petitioners. (*Id.*) Petitioners plainly wish to pretend that Chief Mentzer and Lt. Ditzler absconded with Borough records to which—in the Petitioners' view—they had no right of access.

Petitioners' attempt to rewrite history is unavailing here for several reasons. First, in the precise words of the Petitioners' own Amended Complaint both Chief Mentzer and Lt. Ditzler were responsible on a day to day basis for maintaining the personnel records at issue here:

> Mentzer maintains the personnel files for the Borough of all the Petitioners in his office. . . (*Amended Complaint* at ¶ 15)
>
> Upon information and belief Ditzler has, and had, access to these files also, as does and did, the Borough . . . (*Amended Complaint* at ¶ 16)

Second, it was clearly the Petitioners' own decision to sue the Borough *as well as* Chief Mentzer and Lt. Ditzler both in their individual and official capacities. One can only conclude that, for the sole purpose of making the recitation of their argument more dramatic, Petitioners simply ignore the facts presented below.

Similarly, Petitioners claim that "if the police officers had an opportunity to be made aware of what they were going to confront at their depositions, as possible fact witnesses, they could

have pursued their files and may have seen fit to object." *Petitioners' Brief* at p. 14. This argument founders when one considers that Michael Lyons identified Petitioners Deardorff, Martin, Shuey (and Gordon Berlin who is not a Petitioner instantly) in his Rule 26(a) Initial Disclosures as persons who might have possessed discoverable information regarding his allegations of "disparate treatment." (SA pp 3-4; Lyons' Rule 26(a) Disclosures) Petitioners Roberts and Wheale were also identified as fact witnesses during discovery in Lyons I. Further, Lyons requested "copies of all memoranda, summaries of writings, documents, diagrams, pictures, emails, complaints, logs, journals, discipline actions etc.

in your possession." (SA pp 7-8; Lyons' Request for Production of Documents)

It *is* a fact that the Borough Respondents deposed the Petitioners, each one of whom Petitioner Lyons identified as possessing discoverable information. And, because the centerpiece of Lyons' claim was that he was treated differently than other officers in matters of, *inter alia*, discipline[2], it is equally unsurprising that the questions asked during

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[2] In Lyons I, Michael S. Lyons filed a civil rights action in which he claimed that he "suffered retaliation in the form of disparate treatment such as improperly applied excessively severe and unique punishment *different from how other officers similarly situated were treated*, ostracism, *less* desirable duty assignments, consistent harassment, and the intentional denigration of his professional standing . . ." (JA p. 35; *Complaint* in Lyons I at ¶ 9 (Emphasis added)).

these depositions focused on the Petitioners' comparative individual service records which Lyons placed at issue based on the allegations of his Complaint.

Accordingly, the fact that the Petitioners were all specifically deposed as fact witness and that they were going to be asked questions about, *inter alia*, their employment since Mr. Lyons had claimed that he had been treated less favorably than other employees should have been no surprise to anyone involved. That was, obviously, the whole point in deposing the Petitioners.

Further, as the District Court properly noted, none of the Petitioners complained of misconduct during the pendency of Lyons I. (Appendix B, 21a n.9) However, on appeal,

Petitioners claim that their counsel in the instant litigation (who was also counsel for Petitioner Lyons in Lyons I) "objected strenuously" to the use of personnel records in depositions. (Petition, p. 4)

The deposition of Petitioner Clair Martin took place on May 29, 2008 and the final deposition (of Petitioner Tim Wheale) took place on July 1, 2008. Curiously, at no time during that ten-week interval did Lyons' counsel (the same counsel in the instant litigation) or any other Petitioner seek the intercession of the District Court though plainly they could have done so under Fed. R. Civ. P. 30(d)(3)(A). (Appendix B, 21a and n. 9)

It is improper to seek to institute a separate lawsuit to make a *post hoc* objection to alleged conduct in a previously closed case. Petitioners here had only to file an objection to the use of the documents under Fed. R. Civ. P. 30(d)(3)(A) in order to secure a remedy to the conduct about which they complain in this action. Petitioners' failure to do so is fatal to their claim.

On appeal, the Third Circuit affirmed the dismissal of Petitioners' substantive due process claims. In doing so, the panel applied the "shocks the conscience" standard to the Respondents' conduct. County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). In Lewis, this Honorable Court explained that "the core of the concept" of due process is "protection against arbitrary

action," and that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 845-846. In their Petition, Petitioners seem to assert that the Third Circuit applied the appropriate legal standard to the particular facts of this case. While Petitioners may disagree with the panel's decision under the circumstances, such a disagreement does not constitute a compelling reason warranting discretionary review by this Honorable Court.

II. The courts below properly concluded that the claims against Respondents Mentzer and Ditzler were barred by qualified immunity in that their actions in utilizing Borough owned and maintained personnel records and files in the defense of the predecessor litigation did not violate clearly established rights of which a reasonable official would have known.

As a threshold matter, Respondents contend that Petitioners have waived any issues with respect to the District Court's ruling that qualified immunity barred the claims against Respondents Mentzer and Ditzler. *See*, Simmons v. Beard, 581 F.3d 158 (3d Cir. 2009); United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005)(citing "the well established rule that the failure to identify or argue an issue in an opening brief constitutes waiver of that issue on appeal").

In their Appellate Brief, Petitioners did not identify or argue any issue with respect to the District Court's ruling on the qualified immunity issue. In fact, the words "qualified immunity" did not even appear in Petitioners' Third Circuit Brief. Pursuant to the holdings in Simmons and Pelullo, *supra.*, Appellants have waived any issue on appeal with respect to application of the qualified immunity defense. Even if Petitioners' Third Circuit Brief could be construed as addressing the clearly established law prong of the analysis, their Brief was completely devoid of any argument on whether a reasonable police administrator in Respondents' shoes would know that their actions constituted a violation of Petitioners' federally protected rights.

Consequently, the District Court's ruling in favor of Respondents Mentzer and Ditzler on qualified immunity grounds was properly affirmed as a matter of law.

In their Petition, Petitioners identify two questions presented for review. Neither of those questions addresses the application of the qualified immunity defense by the Courts below. (Petition p. 1) Moreover, no where in their Petition do Petitioners aver that the District Court and/or Third Circuit panel applied the wrong legal standard with respect to the qualified immunity defense or misapplied the correct qualified immunity standard to the allegations of the Amended Complaint in dismissing their claims. As such, Petitioners have not properly

preserved any issue for review by this Honorable Court with respect to the dismissal of the claims against Respondents Mentzer and Ditzler on qualified immunity grounds.

Even if the issue of qualified immunity is properly before this Honorable Court, which is denied, there was no error by the courts below in the application of that defense to the facts as alleged in the Amended Complaint. In their dispositive motion and supporting brief, Respondents Mentzer and Ditzler sought the dismissal of the claims asserted against them under the doctrine of qualified immunity. It is well settled that qualified immunity shields public officials from liability if their conduct does not violate a clearly established constitutional

right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Wilkie v. Robbins, 551 U.S. 537 (2007). "Qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful.'" Hope v. Pelzer, 536 U.S. 730, 739 (2002)(citation omitted). Qualified immunity is a question of law for the court to decide early in the litigation process. Grant v. City of Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996), *cert. denied*, Ricciardi v. Grant, 532 U.S. 919 (2001).

In order to be "clearly established a Plaintiff must show that "in light of preexisting law, the conduct at issue has, in a more particularized sense, been determined to be unlawful." McLaughlin v. Wilson, 271 F.3d 566,

571 (3d Cir. 2001), *cert. denied*, 535 U.S. 989, 122 S. Ct. 1543, 152 L. Ed. 2d 469 (2002). Significantly, the burden of identifying a clearly established right is not fulfilled by simply citing a constitutional provision. Petitioners have failed woefully in establishing violations of any constitutional right by Respondents Mentzer and Ditzler. As fully explained above, there is no law to support the Petitioners' claimed application of the cited constitutional rights, much less the required, preexisting law that clearly establishes the same. As such, the District Court properly concluded that the Amended Complaint against the individual Respondents was subject to dismissal on qualified immunity grounds.

Nor could reasonable persons in the position of Respondents Mentzer and Ditzler have known that their actions would deprive Petitioners of any such rights. This second prong of the qualified immunity test recognizes that public officials are not constitutional scholars and is designed to insure that "the contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 639 (1987); Pearson v. Callahan, ____ U.S. ____, 129 S. Ct. 808, 815 (2009). As this Honorable Court has explained, this is a high hurdle for Plaintiffs to overcome because qualified immunity provides "ample protection to all but the plainly incompetent, or those who knowingly

violate the law." Groh v. Ramirez, 540 U.S. 551, 571 (2004).

In the case *sub judice*, no reasonable public official, including Respondents Mentzer and Ditzler, could have known that the actions at issue would somehow violate the claimed constitutional rights of the Petitioners to privacy and freedom in their associations, privacy in their persons or protection of their property. Respondents' alleged conduct involved their use of Borough owned personnel and business records, over which they exercised appropriate responsibility, to prepare and implement a defense to litigation initiated by one of the Petitioners, and conduct discovery of Petitioner Lyons' claims by deposing witnesses and

reviewing the documents identified by Lyons himself. This is the essential conduct of any defendant in any such civil action. Respondents Mentzer and Ditzler discussed the contents of the personnel records only with defense counsel, and utilized the information only in the confines of the pending judicial proceeding. There was no, nor do Petitioners allege, an abusive use or dissemination of the information outside of the judicial proceeding.

Thus, as Petitioners' claimed rights are not clearly established and a reasonable person would not have known that the conduct at issue would be violative thereof, qualified immunity attaches and provides an alternative grounds for affirming the District Court's ruling dismissing the

Amended Complaint as to Respondents Mentzer and Ditzler.

III. Petitioners remaining contentions are meritless.

On page 7 of their Petition, Petitioners contend in conclusory fashion that the courts below ignored and/or expressly departed from holdings of this Court and from the Third Circuit. Such an assertion is fatuous in that none of the authorities cited by Petitioners at all address the issue presented herein, *to-wit*, whether or not they had any privacy rights and/or property interests in Borough owned or Borough maintained personnel records sufficient to invoke the protections of the Fourth or Fourteenth Amendments to the United States Constitution.

By way of example, Hunter v. Securities Exchange Committee, 879 F.Supp. 494 (E.D. Pa. 1995) involved the disclosure of subpoenaed financial records by a federal investigator to a private third party. Hunter does not address a government employer's use of its own personnel records in its own defense of an employment lawsuit.

Similarly, Whalen v. Roe, 429 U.S. 589 (1977) involved a question of whether or not New York's enactment of law requiring that prescriptions for the most dangerous legitimate drugs be prepared on official forms with one copy being sent to the state was a reasonable exercise of New York's police powers. Again, Whalen v. Roe, did not address a government employer's use

of its own personnel records in its own the defense of an employment lawsuit.

In Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105 (3rd Cir. 1987), the Fraternal Order of Police (FOP) brought a constitutional challenges to a questionnaire promulgated by the Philadelphia Police Department for use in selecting applicants to its Special Investigations Unit (SIU). This Court partially affirmed the district court's grant of an injunction which concluded that portions of the questionnaire seeking information concerning applicants' medical history, gambling habits and alcohol consumption, and seeking information about applicants' and their families' financial status, organizational memberships, and arrest

records violated police officers' federal constitutional rights of privacy and association.

Although this case did not address a government employer's use of its own personnel records in the defense of an employment lawsuit nor did it specifically address issues arising under the Fourth or Fourteenth amendment, it is notable that in Fraternal Order of Police, Lodge No. 5, the Third Circuit affirmed that governmental employers have a greater interest in personnel records even those involving medical and financial information and that employees have "little reasonable expectation that such medical information will not be requested." Thus, no constitutional violation was found by virtue of the City's decision to seek that information.

Finally, National Archive & Record's Administration v. Favish, 541 U.S. 157 (2004) involved a Freedom of Information Act (FOIA) action, which sought to compel production of death-scene photographs of the body of Vincent Foster, former President Clinton's deputy counsel who died of apparent suicide. The fact that this Honorable Court interpreted the FIOA's personal privacy exception to exclude from production certain death-scene photographs hardly provides a basis for this Court to find that the Borough violated Petitioners' Fourth and Fourteenth Amendment rights.

Petitioners have not and cannot identify any compelling reasons warranting discretionary review of the rulings of the courts below.

Petitioners have not identified any relevant decisions issued by this honorable Court which are in conflict with the rulings of the courts below. Petitioners identify no Circuit split or legal holding by any other Circuit Court of Appeals which have recognized protected privacy and/or property rights under analogous circumstances. Consequently, this Petition must be denied.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully Submitted,

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